

INTERIOR BOARD OF INDIAN APPEALS

State of Kansas v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

36 IBIA 160 (05/30/2001)

STATE OF KANSAS,	:	Order Vacating Decision
Appellant	:	and Remanding Case
	:	
v.	:	
	:	Docket No. IBIA 01-44-A
ACTING SOUTHERN PLAINS REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	May 30, 2001

This is an appeal from a November 15, 2000, decision of the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to take four lots in Block 11, City of Reserve, Brown County, Kansas, into trust for the Sac and Fox Nation of Missouri in Kansas and Nebraska (Nation). The Regional Director's decision indicates that the land is to be used for a fire station and EMT service unit and that it is not within or adjacent to the Nation's reservation. For the reasons discussed below, the Board vacates the Regional Director's decision and remands this matter to him for further consideration.

The Nation purchased the land at issue in 1992. It apparently sought trust acquisition of the land sometime prior to November 15, 1993, although no written request from that time is included in the record. ^{1/} On November 15, 1993, the Acting Superintendent, Horton Agency, BIA, sent notice of the proposed trust acquisition to the Kansas Secretary of Revenue and the Brown County Assessor. The notice letters requested certain information concerning the property, *i.e.*, information as to property taxes, special assessments, governmental services, and zoning. The letters also invited comments and stated that any comments received within 15 days of the date of the letters would be considered.

The Kansas Secretary of Revenue responded on November 17, 1993, stating that the information requested was in the custody of the Brown County Appraiser's Office and that the notice letter was therefore being forwarded to that office. An official in the County Appraiser's Office responded on November 18, 1993, stating that 1993 property taxes were \$6.73, that there were no special assessments on the property, and that BIA should check with the City of Reserve concerning zoning. It does not appear that BIA contacted the City of Reserve.

^{1/} The record includes two tribal resolutions requesting trust acquisition of the land. These are Resolutions R-15-94, dated May 11, 1994, and R-17-99, dated June 14, 1999.

Except for an appraisal prepared in January 1994 and updated in July 1998, there is no record of any further action by BIA until 1999.

In a November 29, 1999, memorandum to the Regional Director, the Field Representative, Horton Field Office (formerly Superintendent, Horton Agency), recommended that the land be taken into trust and requested that a preliminary title opinion be sought from the Solicitor's Office.

By memorandum of March 9, 2000, the Tulsa Field Solicitor furnished a preliminary title opinion. In the same memorandum, he advised BIA that it must provide notice to the State and local governments, including the City of Reserve, in accordance with 25 C.F.R. §§ 151.10 and 151.11 because the notice given in 1993 was not in compliance with the requirements of the present regulations. It does not appear, however, that BIA gave any further notice to Appellant or Brown County, or any notice at all to the City of Reserve, prior to June 28, 2000, when the Acting Field Representative issued a decision to take the land into trust. Copies of that decision were sent to the Mayor and City Council of the City of Reserve, the Brown County Commissioners, and the Governor of Kansas.

Appellant appealed the Acting Field Representative's decision to the Regional Director, who affirmed it on November 15, 2000. Appellant then appealed to the Board.

Appellant makes essentially the same arguments it made in Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152 (2001) (Kansas I). Thus its arguments are, for the most part, subject to the analysis in Kansas I. In this case, however, the Board agrees to some extent with Appellant's argument that the State and local governments were not given an adequate opportunity to present their objections to the acquisition. ^{2/} In particular, the Board finds that BIA failed to provide notice in accordance with 25 C.F.R. § 151.11(d).

The Superintendent's 1993 notice letters predated the 1995 amendment to 25 C.F.R. Part 151 which added the specific notice requirements now found in 25 C.F.R. §§ 151.10 and 151.11. See 60 Fed. Reg. 32874 (June 23, 1995). While the notice given in 1993 was

^{2/} Appellant contends that it was entitled to a forum in which to present evidence and in which "to test the credibility and veracity of the tribe's purported evidence to support its request." Notice of Appeal at 4. As discussed in Kansas I, 36 IBIA at 157-58, Appellant's rights under 25 C.F.R. §§ 151.10 and 151.11 do not include the right to an evidentiary hearing or the right to cross-examine tribal witnesses. Appellant does, however, have the right to a 30-day period in which "to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d).

not deficient under the regulations in effect at that time, it had clearly become deficient long before the Acting Field Representative issued her decision in June 2000.

For one thing, BIA failed to give any notice to the City of Reserve, which is a "local government[] having regulatory jurisdiction over the land to be acquired." Under the present regulations, the City was entitled to receive notice. See Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director, 34 IBIA 149, 157-58 (1999). Further, Appellant and Brown County were entitled under the present regulations to a longer period of time in which to prepare and submit comments, and thus a greater opportunity to make meaningful comments, than they were given in 1993. Finally, the Nation was entitled under the present regulations to an opportunity to respond to comments made by Appellant, the County, and the City.

The defect in notice under 25 C.F.R. § 151.11(d) was not cured by the fact that Appellant, the County, and the City were given notice of the Acting Field Representative's June 28, 2000, decision and informed of their right to appeal that decision to the Regional Director. Under subsection 151.11(d), Appellant and the local governments were entitled to have their comments taken into consideration during BIA's initial analysis of the trust acquisition request and prior to any BIA decision in the matter. In any event, to the extent BIA intended that the appeal procedure would substitute for the initial notice and comment procedure, it failed to so inform the parties or to offer Appellant, the County, and the City a belated opportunity to submit comments under 25 C.F.R. § 151.11(d) during the appeal proceedings.

BIA might be well advised to solicit updated comments in any case where there is an extended delay between its last communication with State and local governments and its trust acquisition decision, even where the original notice was in compliance with present regulations (*i.e.*, the regulations in effect at the time the trust acquisition decision is to be made). See Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 36 IBIA 14, 24 (2001). As circumstances will vary from case to case, the Board does not reach any general conclusion in this regard. However, it holds that, whether because of the passage of time or for other reason, BIA's original notice to State and local governments was not in compliance with present regulations, and the defect in notice has not been cured through subsequent communication with the State, local governments, and the trust acquisition applicant, BIA must provide new notice, in compliance with present regulations, before issuing a decision on a trust acquisition application.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's November 15, 2000, decision is vacated, and this matter is remanded to him. He shall provide notice of the proposed trust acquisition to State and local governments in accordance with 25 C.F.R. § 151.11(d); allow for a response from the Nation; and consider any timely comments which address "the

acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments" when he issues a new decision in this matter. 3/

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

3/ Also on remand, the Regional Director shall verify the distance between the land proposed for trust acquisition and the Nation's reservation. There are conflicts in the present record on this point. The Field Representative's Nov. 29, 1999, memorandum states that the property is approximately 1/2 mile from the reservation. The Acting Field Representative's June 28, 2000, decision states that it is 1 mile from the reservation. The Regional Director's decision returns to the Field Representative's original statement that it is approximately 1/2 mile from the reservation.

As the Regional Director indicated in his decision, distance from a tribe's reservation is an important factor in BIA's analysis of a proposed off-reservation trust acquisition. 25 C.F.R. § 151.11(b).